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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 810

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM R. MARION AND SAMUEL C. CRATCH

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not deliver a written opinion. Its oral explanation of its ruling is set out at App. 39.

JURISDICTION

On June 8, 1970, the district court entered an order dismissing the indictment on the ground of lack of speedy prosecution. A notice of appeal was filed on July 8, 1970. On March 1, 1971, this Court entered an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (App. 42). Under 18 U.S.C. 3731, this Court has jurisdiction, on direct appeal, to review a decision sustaining a motion in bar, where the defendants have

not been put in jeopardy. See *United States* v. *Blue*, 384 U.S. 251; *United States* v. *Ewell*, 383 U.S. 116, and *infra*, pp. 13–14.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under former 18 U.S.C. 3731 to consider the government's appeal from an order dismissing an indictment on the ground that there has been a lack of speedy prosecution.

2. Whether the Sixth Amendment's guarantee of a speedy trial applies before charges have been brought.

3. Whether the Due Process Clause of the Fifth Amendment provides a basis for shortening the criminal statutes of limitations specified by Congress, or whether the courts should ordinarily assume such a function in the exercise of supervisory power.

4. Whether, even if the courts should enter this area, an indictment may properly be dismissed on the basis of pre-indictment delay that was not purposeful, oppressive, or actually prejudicial to the defendants.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULE INVOLVED

The Fifth Amendment provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been com-

> mitted, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. 3282 provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. 3731 provides in pertinent part:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> * * * * *
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

Rule 48(b), F.R.Cr.P., provides:

> If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

STATEMENT

On April 21, 1970, an indictment was filed in the United States District Court for the District of Co-

lumbia, charging appellees with mail fraud (four counts), wire fraud (one count) and transporting falsely made securities in interstate commerce (fourteen counts), in violation of 18 U.S.C. 1341, 1343, and 2314. The indictment alleged that from March 15, 1965, to February 6, 1967, appellees operated a business in North Brentwood, Maryland, known as Allied Enterprises, Inc., which sold and installed home intercom, fire control, and burglary detection systems, and the like; that they induced homeowners to enter into contracts through false promises and representations; that after making token starts on the installation work specified in the contracts, appellees induced the homeowners to sign partially executed deeds of trust or promissory notes, which they later secretly altered and transferred to persons or firms who purported to be holders in due course; and that in furtherance of their scheme appellees engaged in the conduct forming the basis for each of the nineteen counts in the indictment (App. 2–5). The earliest conduct forming the basis for a count in the indictment allegedly occurred on September 3, 1965 (count 1), the latest on January 19, 1966 (count 19). Twenty-one named individuals and "divers other persons" were described as victims of the scheme (App. 2).

On May 5, 1970, appellees filed a motion to dismiss the indictment on the ground that they had been denied a speedy trial (App. 12–14). Appellees asserted that the events charged in the indictment were a matter of public knowledge by October 1967, when they were described in a series of newspaper articles; that pertinent files of Allied Enterprises had been volun-

tarily turned over to the government in the summer of 1968, at which time appellee Marion had engaged in discussions with government counsel; and that notwithstanding these circumstances, the grand jury that indicted appellees was not empanelled until September 2, 1969, and appellees were not advised until March 1970 that the matters were under consideration. Appellees claimed that the delay between the time the offenses were alleged to have been committed and the indictment was unreasonable and oppressive under the Fifth and Sixth Amendments to the Constitution because they were now compelled to defend against charges that would require them to remember events long past and to produce "evidence, both testimonial and documentary, which may have become unavailable by the passage of time" (App. 13–14).

At a hearing conducted by Judge Hart on June 8, 1970, the following was adduced.[1] In September and October 1967, the Washington Post published a series of articles dealing with deceptive practices of certain home improvement companies (App. 24–25). Most of the articles were devoted to the operations of another firm, but, on October 4 the newspaper mentioned appellees and their company, Allied Enterprises (App. 26). On several occasions the Post articles contained comments by the then United States Attorney for the District of Columbia to the effect that his office had begun intensively investigating the practices of a dozen home improvement firms; that a two man "fraud squad" had been specially designated to investigate

[1] No witnesses were called by either side. The factual description is derived from the colloquy between the court and counsel.

allegations of deception; that a special grand jury sworn on October 9, 1967, would devote some time to reviewing the practices of such companies; that his office had been receiving complaints for two years, and two indictments (not connected with the defendants) had already been filed earlier that year; and that he expected indictments within two weeks (A. 24–28). The newspaper also quoted the United States Attorney as stating that the fraud claims are "not the crimes of violence I am now particularly interested in, of course, but it is the kind of illegal conduct we will look into." (A. 26).

After quoting at length from the Washington Post articles, particularly the remarks attributed to the United States Attorney, defense counsel argued that the government could have proceeded long before it did, and suggested that appellees' recollections and counsel's ability to prepare their defenses were apt to have been seriously prejudiced by the delay. In counsel's view, the probability of memory lapses, coupled with the "intense notoriety" the case had received in 1967 and the "repeated suggestions" by the United States Attorney that indictments were expected to be returned momentarily, warranted dismissal of the indictment (A. 29–30). There was, however, no specific reference to any particular prejudicial factor.

Government counsel responded that he had stipulated to the authenticity of the newspaper articles cited by the defense, but not to the truth of their substantive allegations, about which he was in no position to comment because he was not a member of the United States Attorney's Office at the time. Counsel stated that,

assuming the articles to be true, he had been advised that a heavy case load and an understaffed office prevented more expeditious handling of the matter. (App. 35). He noted that in any event no actual prejudice to appellees had resulted from the delay, since the evidence in the case was essentially documentary and the scheme alleged in the indictment would be shown to have been the customary manner in which the defendants conducted business; thus, they would not be called upon to recite specific detailed instances divorced from their usual dealings. The prosecutor cited the existence of several pending civil actions against the defendants involving the same fraudulent scheme,[2] which would necessarily assist them in maintaining their recall. In addition, he observed that the pertinent documents in the government's custody had always

[2] There were at least seven such cases in the United States District Court for the District of Columbia. (Appellees' company, Allied Enterprises, maintained its offices in Maryland (App. 3).)

One was brought by George and Ruth Crutchfield, who are named in Count 18 of the indictment as victims of appellees' fraudulent scheme. *Crutchfield* v. *Allied Enterprises, et al.*, Civ. No. 1916–66, settled as to all defendants except Allied on March 14, 1968; settled and dismissed with prejudice as to Allied on December 2, 1968.

Another involved the Reverend Andrew Johnson, who is named in Count 9 of the indictment as a victim of appellees' fraudulent scheme. *Benson, et al.* v. *Allied Enterprises, Cratch, Marion, et al.*, Civ. No. 2451–68. This was a class action; Reverend Johnson's affidavit was filed on March 3, 1969. The case is presently on appeal, Judge Hart having dismissed the complaint on October 30, 1970, for lack of personal service of process and for failure to state a cause of action in two of the 7 counts. (The complaint was filed on October 1, 1968.)

The other cases are:

Harris v. *Allied Enterprises et al.*, Civ. No. 1917–66 (last

been available for inspection by defendants or their counsel. Finally, he argued that a claim of denial of a speedy trial based upon the possibility of faulty memories resulting from delay was premature at this stage. (App. 32–36.) [3]

Following argument of counsel, Judge Hart issued his order dismissing the indictment. He ruled that the "matters complained of * * * were known from early 1967 or a matter of common knowledge in late 1967" and that the three-year "delay" from 1967 could not be justified by the need for "research and examination" because this could have been done sooner. Referring to the fact that the counts in the indictment involved specific transactions, Judge Hart concluded that "by the very nature of this outrageous

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docket entry—time for filing ready certification extended to December 31, 1968).

Talbert v. *Cratch et al.*, Civ. No. 1950–66 (settled and dismissed with prejudice December 30, 1968).

Elliott v. *Atlas Credit Corp., et al.*, Civ. No. 2629–66 (default judgment entered against Allied on February 6, 1969; dismissed as to Cratch on August 29, 1969).

Hawkins v. *Allied Enterprises, et. al.*, Civ. No. 253–67 (settled and dismissed with prejudice on May 12, 1969).

Johnson v. *Allied Enterprises, et al.*, Civ. No. 2458–67 (on May 4, 1971, a consent order was filed voiding a note payable to Allied and the plaintiffs' executed deed of trust).

[3] The Federal Trade Commission issued a complaint against Allied Enterprises and defendant Marion (App. 26), but when the respondents failed to answer and failed to appear for a hearing, the examiner, on February 6, 1967, issued a default judgment against them, ordering Allied and Marion to cease and desist from failing to inform their customers that even though they were purchasing under a referral plan they were nevertheless responsible for the full amount of their purchases. *Allied Enterprises, Inc.*, CCH Trade Reg. Rep. ¶¶ 17,737, 17,849 (Transfer Binder 1965–1967).

scheme," alleged in the indictment, the defendants' ability to recollect and prepare their defense was "bound to have been seriously prejudiced by the delay" (App. 39).

The applicable statute of limitations, 18 U.S.C. 3282, permits prosecution if the "indictment is found or the information is instituted within five years next after such offense shall have been committed." The indictment here was brought within the prescribed period.

SUMMARY OF ARGUMENT

I. Under former 18 U.S.C. 3731, the district court's order dismissing the indictment is a "judgment sustaining a motion in bar" and is therefore directly appealable to this Court. Appellees' plea before the district court did not challenge the allegations of criminal activity in the indictment, but rather urged dismissal because of pre-indictment delay. Under *United States* v. *Weller*, No. 77 (decided February 24, 1971), this is clearly a "motion in bar"; and the district court's order granting the motion permanently bars the government from prosecuting appellees for the offenses charged in the indictment.

II. The Sixth Amendment provides that in all "criminal prosecutions" the "accused" shall have the right to a speedy trial. Before arrest or indictment, however, a person is not an "accused" and the speedy trial guarantee therefore does not apply. That the framers so intended is confirmed by the history of the Sixth Amendment, which indicates that the right did not arise until criminal proceedings had commenced at least by way of arrest.

Expanding the Sixth Amendment to cover pre-arrest or pre-indictment delay by defining an "accused" as a person against whom the government has sufficient evidence to seek an indictment would be both unwarranted and unwise. Although one of the three policies underlying the right to a speedy trial might be implicated in this kind of delay—impairment of the ability to defend—the effect of the passage of time on a potential defendant does not depend on the quantum of evidence in the government's possession. Moreover, as *Hoffa* v. *United States,* 385 U.S. 293, recognized, the fact that the government has enough evidence to establish probable cause in no way obligates it to move against a suspect. Much more may be needed to secure a conviction. Also, where there is concurrent federal-state jurisdiction, federal prosecutors often must await the state's decision about whether it will fulfill its primary responsibility by prosecuting. In the regulatory area, the decision to prosecute may turn not on when sufficient evidence is available, but rather on the effectiveness of securing compliance by methods less stringent than criminal sanctions. In addition, the fact that certain evidence has been collected does not mean the case is assembled and ready to be presented to the grand jury. Furthermore, requiring prosecutorial action as soon as a certain amount of evidence has been discovered would encourage expediency and discourage thoroughness, thus impeding efforts to shorten the time between charge and trial, for the success of which thorough precharge preparation is essential. And finally, such an interpretation would

give rise to lengthy pretrial hearings and add still another preliminary hurdle before trial. For cases that are not dismissed at this stage, and this would doubtless consist of the overwhelming majority, the result would be to stretch out the period between charge and trial even further, to the detriment of all concerned.

III. These considerations also counsel against establishing a general rule under the Due Process Clause to supervise when criminal charges must be brought. In enacting the statute of limitations Congress balanced the harm to the defendant against other factors; this Court would have to do the same under the Due Process Clause. Congress' judgment is entitled to great weight and we submit that for cases brought with the statute of limitations, except those where the prosecutor has intentionally delayed in order to impair the defense, due process of law is not denied. Moreover, there are no circumstances presented here that warrant this Court's exercising its supervisory power to govern pre-indictment delay.

IV. Even if this Court were to decide that there should be judicial scrutiny of delay before indictment or arrest, the defendant must at least show that he has been prejudiced by the delay, assuming delay itself has been proven. The drastic remedy of dismissing a criminal prosecution brought within the statute of limitations can only be justified if the harm to the defendant far outweighs the public interest in trying offenders for their criminal acts.

Since the appellees have not shown any actual prejudice, the district court's order dismissing the indictment should be reversed under any theory. Appellees knew they were under criminal investigation; many civil suits involving activities charged in the indictment were being litigated during the supposed delay; the government's proof consisted essentially of documentary evidence, which did not become less reliable during this period; and appellees have not even alleged that any of their witnesses have disappeared or that any of their records have been lost.

ARGUMENT

The district judge dismissed the indictment because there "has been a lack of speedy prosecution in this case" (App. 39). The judge did not specify the precise basis for dismissal, although in view of the arguments of counsel (App. 15, 38), the judge's reference to "speedy prosecution," and the order granting appellees' motion to "Dismiss Indictment for Failure to Afford Speedy Trial" (App. 40), he appears to have relied upon the Sixth Amendment. After discussing the question of jurisdiction, we therefore turn first to the issues raised with respect to the Sixth Amendment. We then discuss whether dismissal was proper under the Due Process Clause of the Fifth Amendment, which appellees also cited as a basis for relief (App. 13, 15).

I

THE ORDER DISMISSING THE INDICTMENT FOR LACK OF SPEEDY PROSECUTION WAS A DECISION SUSTAINING A MOTION IN BAR DIRECTLY APPEALABLE TO THIS COURT UNDER FORMER 18 U.S.C. 3731

In their response to the government's jurisdictional statement, appellees challenged the statutory authority relied upon by the government for taking an appeal directly to this Court from Judge Hart's dismissal of the indictment. The government based its right of appeal on that part of former 18 U.S.C. 3731 permitting a direct appeal to this Court from a district court's decision in a criminal case "sustaining a motion in bar, when the defendant has not been put in jeopardy." [5] Appellees argue that the dismissal of the indictment for "lack of speedy prosecution" does not constitute the granting of a motion in bar but is a decision premised upon the court's discretionary power under Rule 48(b).

United States v. *Weller,* No. 77, this Term, February 24, 1971, decided after the filing of our jurisdictional statement, makes clear that the phrase "motion in bar" encompasses all pleas in the nature of confession and avoidance, that is, where the defendant did not deny that he had committed the acts charged or that those acts constituted a crime, but nevertheless urged that he could not be prosecuted because

[5] The 1970 amendment to the Criminal Appeals Act, 84 Stat. 1890, is not applicable to the present appeal since by its own terms that amendment does not apply to cases "begun in any district court before [its] effective date," *i.e.*, January 2, 1971. See *United States* v. *Weller*, No. 77, this Term, decided February 24, 1971, slip op. p. 1, n. 1.

of some extraneous factor, such as the tolling of the statute of limitations or the denial of a speedy trial.

Judge Hart's dismissal, if upheld, permanently bars the government from prosecuting appellees for the offenses alleged in the indictment. If prejudice did result from the government's delay in securing an indictment, that prejudice cannot be cured. Thus, no matter what terminology is applied to the basis for dismissal, see *United States* v. *Goldman,* 277 U.S. 229; *United States* v. *Hark,* 320 U.S. 531, the actual effect is to bar future indictments for the same offenses. This was no mere dismissal without prejudice for failure to prosecute, as might have occurred on the basis of post-indictment delay. See *United States* v. *Ewell,* 383 U.S. 116; *United States* v. *Provoo,* 350 U.S. 857, affirming 17 F.R.D. 183, 203 (D. Md.); *Mann* v. *United States,* 304 F. 2d 394, 397 (CA.D.C.), certiorari denied, 371 U.S. 896. Rather, the order under review was in the most traditional sense a "judgment sustaining a motion in bar."[6]

[6] Judge Hart did not mention Rule 48(b) of the Federal Rules of Criminal Procedure, undoubtedly because that provision has no applicability here. Rule 48(b) allows the court to dismiss an indictment if there is "unnecessary delay in presenting the charge to a grand jury * * * against a defendant who has been held to answer to the district court." But the "delay" here occurred before the appellees had been "held to answer to the district court." See, *e.g., Nickens* v. *United States,* 323 F. 2d 808, 809 (C.A.D.C.), certiorari denied, 379 U.S. 905; *Hanrahan* v. *United States,* 348 F. 2d 363, 366, (C.A.D.C.); *Hoopengarner* v. *United States,* 270 F. 2d 465, 469 (C.A.6); *United States* v. *Kabot,* 185 F. Supp. 159 (S.D.N.Y.), affirmed, 295 F. 2d 848 (C.A. 2), certiorari denied, 369 U.S. 803; 8a Moore, *Federal Practice* 48–12 (Cipes ed. 1970); 6 Orfield, *Criminal Procedure under the Federal Rules* 357 (1967).

II

THE RIGHT OF AN ACCUSED TO A SPEEDY TRIAL UNDER THE SIXTH AMENDMENT DOES NOT ARISE UNTIL CRIMINAL CHARGES HAVE BEEN BROUGHT

The relatively few speedy trial decisions of this Court have all involved situations where the defendants objected to delays occurring after criminal proceedings had been instituted. *Dickey* v. *Florida,* 398 U.S. 30; *Smith* v. *Hooey,* 393 U.S. 374; *Klopfer* v. *North Carolina,* 386 U.S. 213; *United States* v. *Ewell,* 383 U.S. 116; *Pollard* v. *United States,* 352 U.S. 354; *Beavers* v. *Haubert,* 198 U.S. 77. Here, in contrast, the defendants, who were never arrested, claim that it was the passage of time preceding indictment that deprived them of their right under the Sixth Amendment. In recent years, and with increasing frequency, the courts of appeals have passed on similar claims. Although a few circuits appear to have left the question open, see *Schlinsky* v. *United States,* 379 F. 2d 735 (C.A. 1); *United States* v. *Feinberg,* 383 F. 2d 60 (C.A. 2), most have held that **the Sixth Amendment does not govern the time when** criminal charges must first be brought. See, *e.g., Kroll* v. *United States,* 433 F. 2d 1282 (C.A. 5), certiorari denied, May 5, 1971, No. 1314, this Term, *Hoopengarner* v. *United States,* 270 F. 2d 465 (C.A. 6); *United States* v. *Napue,* 401 F. 2d 107 (C.A. 7), certiorari denied, 393 U.S. 1024; *Terlikowski* v. *United States,* 379 F. 2d 501 (C.A. 8); *Benson* v. *United States,* 402 F. 2d 576 (C.A. 9); *United States* v. *Reed,* 413 F. 2d 338 (C.A. 10), certiorari denied *sub nom. Sartain* v. *United States,* 397 U.S. 954; *Nickens* v. *United States,* 323 F. 2d 808 (C.A. D.C).

The wording of the Sixth Amendment leaves little

doubt: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * * and to be informed of the nature and cause of the accusation * * *." The language could hardly be clearer that only an "accused" in a "criminal prosecution" has a right to a speedy trial, and the natural meaning of "accused" is a person who has been charged with a crime. The Sixth Amendment says nothing about how quickly investigations of criminal activity must culminate in the filing of charges against those suspected, or, indeed, how soon a crime must be detected before the initiation of a criminal prosecution is foreclosed.

The natural meaning of the speedy trial guarantee in the Sixth Amendment is confirmed by its history, much of which is recounted in *Klopfer* v. *North Carolina*, 386 U.S. 213, 223–226. Sir Edward Coke's observation [7] that thirteenth century justices with gaol or oyer and terminer commissions would not suffer a prisoner to be long detained presupposes situations where criminal proceedings had at least begun by way of arrest. 386 U.S. at 224. The Habeas Corpus Act of 1679, 31 Charles II, c. 2, which Blackstone described as "the great bulwark of [the English] constitution," [8] had a similar premise. The Act provided for "more speedy relief of all persons imprisoned for any such criminal or supposed criminal matters" and required that persons jailed for felonies or treason be brought to trial upon their own motion within two terms of

[7] Coke, The Second Part of the Institutes of the Laws of England 43 (Brooke, 5th ed., 1797).

[8] IV Blackstone, *Commentaries on the Laws of England* *438 (Lewis ed. 1897); see also *The Federalist* No. 84 (Hamilton).

court or be discharged on bail. *Id.*, section VII. It is not surprising that the Act nowhere even alludes to delay before arrest. For the "maxim of [English] law has always been 'Nullum tempus occurrit regi,' and as a criminal trial is regarded as an action by the king, it follows that it may be brought at any time." 2 Stephens, *A History of the Criminal Law of England* 1–2 (1883) (setting forth illustrative cases).

In this country, most of the states that ratified the Bill of Rights included speedy trial provisions in their constitutions which either copied or used as a guide the English Habeas Corpus Act.[9] And Article 8 of the Virginia Bill of Rights, doubtless the immediate source of the Sixth Amendment, secured the right to a speedy trial in "criminal prosecutions" where "a man hath a right to demand the cause and nature of his accusation."[10] Thus, both the language used by the framers and the light which history sheds on its intended meaning indicate clearly that the Sixth Amendment's guarantee of a speedy trial was designed to assure that those accused of crimes would have their trial without undue delay, not that those at large would be speedily accused of criminal activity.

It has been suggested, however, that for speedy

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[9] The state constitutions are cited in *Petition of Provoo*, 17 F.R.D. 183, 197 n. 6 (D. Md.), affirmed 350 U.S. 857; see also Cooley, *Constitutional Limitations*, 312 n. 2 (1868).

[10] Article 8 of the Virginia Bill of Rights reads as follows:

"In all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of twelve men * * *."

See Heller, *The Sixth Amendment* 23 (1951).

trial purposes, a person might be deemed an "'accused' once the government has decided to prosecute him and has sufficient evidence to move against him." *Dickey* v. *Florida, supra,* 398 U.S. at 45 n. 8 (Brennan, J., concurring). The record in this case does not reveal when the government decided to prosecute. But the district judge did find that the activities mentioned in the indictment "were known from early 1967 or a matter of common knowledge in late 1967," and, in referring to a three-year "delay," he measured this from 1967 (App. 39). The rule applied below thus appears to be that the right to a speedy trial attaches either (1) whenever the government is deemed to have sufficient evidence to seek an indictment or (2) whenever such evidence becomes a "matter of common knowledge." We cannot agree with either a "decision" or a "sufficient evidence" criterion.

In *United States* v. *Ewell, supra,* 383 U.S. at 120, this Court recognized that the Sixth Amendment's guarantee of a speedy trial is an "important safeguard [1] to prevent undue and oppressive incarceration prior to trial, [2] to minimize anxiety and concern accompanying public accusation and [3] to limit the possibilities that long delay will impair the ability of an accused to defend himself." The first and second of these policies are usually not pertinent when the delay occurs before indictment or arrest. The defendant is free and he has not yet been charged with a crime. This case is no exception. To be sure, articles in the Washington Post implicated the defendants in fraudulent activity, but the newspaper nowhere attributed

any such allegation to the United States Attorney or even mentioned any official indication that they or their company were under investigation.[11] The remedy for accusations by private persons is a civil suit for libel or slander; when the government has made no official charge, there is no logical reason why it should be expected to take any step to "minimize anxiety and concern."

The defendant's ability to mount a defense, the third factor referred to in *Ewell,* may of course be affected by the passage of time before, as well as after indictment or arrest. But the effect of the passage of time on a person's ability to defend himself does not depend on when the government has sufficient evidence to move against a suspect, or even when it decides to proceed. If the prosecutor had no evidence at all the effect would be the same, yet even under the district court's test the Sixth Amendment would not apply in these circumstances because the person could not possibly be characterized as an "accused."

To be sure, if the government earlier had enough evidence to establish probable cause, this might have made possible an earlier indictment or arrest. Given ample resources, most things can be done more rapidly, including even the discovery of evidence to establish probable cause, as well as prosecutorial action on such

[11] If our proposition is accepted that the Sixth Amendment does not come into play until the government takes some overt step to "accuse" an individual, questions may of course arise with respect to what amounts to an accusation. This case does not involve any such question since, as we have noted, the appellees had not been arrested and no official statements of any kind had charged them with criminal activity.

evidence after it has been discovered. But there is no basis for the assumption that once the government possesses this quantum of proof it should be obligated to act. Much more may be needed for the government to satisfy itself that a conviction is feasible or appropriate; indeed, further evidence that comes to light may lead to a decision not to indict. The Court recognized this in *Hoffa* v. *United States*, 385 U.S. 293, 309–310, where the petitioner, relying on *Escobedo* v. *Illinois*, 378 U.S. 478, argued that since he would have had a right to counsel under the Sixth Amendment had the government taken him into custody and charged him with an offense, he should have been entitled to the same right at the moment the government had sufficient evidence to do so. In rejecting this argument, the Court said:

> There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.

The same principle applies to indictment as to arrest.

There are further reasons why the fact that the government has enough evidence to seek an indict-

ment should not obligate it to do so at that time. In many cases where there is concurrent federal-state jurisdiction, see, *e.g.*, *Bartkus* v. *Illinois*, 359 U.S. 121, state authorities should have primary responsibility for instituting criminal proceedings. A federal prosecutor may accordingly withhold the filing of charges pending the state's decision whether to act, even though sufficient evidence is already available to support a federal indictment. In regulatory areas, the decision to seek an indictment at a certain time may depend less on the amount of evidence available than on whether methods less stringent than criminal sanctions should be utilized for enforcement.

Moreover, the mere availability of a certain amount of information scarcely means that a case is ready to be presented to a grand jury. Prosecuting authorities cannot be expected to assemble cases bit by bit as each new piece of evidence comes to light, even assuming they are aware of it. They also cannot be expected to keep detailed records of when evidence accumulated to the point of probable or even certain cause to believe a person committed the crime for which he is later indicted. Yet the district court's rule for determining at what point a person becomes an "accused" would require just that.

Of still greater significance, interpreting the Sixth Amendment in this manner would encourage expediency on the part of prosecutors and discourage thoroughness, and would be inconsistent with efforts to effectuate the purposes of the Sixth Amendment by

shortening the period between indictment and trial [12]—a goal that makes thorough precharge preparation all the more essential.

Finally, the inevitable result of judicial inquiry into pre-arrest or pre-indictment delay would be to involve the courts in lengthy hearings to determine matters that are not capable of easy proof. For cases that are not dismissed, which would doubtless be the overwhelming majority, this could only extend the period before trial even further, to the detriment of all concerned. In short, "[t]o recognize a general speedy trial right commencing as of the time arrest or charging was possible would have unfortunate consequences for the operation of the criminal justice system." [13] The Sixth Amendment's language should therefore not be stretched to cover the period preceding the formal bringing of charges or arrest.

III

THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT PROVIDES NO BASIS FOR SHORTENING THE LIMITATIONS PERIODS SPECIFIED BY CONGRESS, AND THE COURTS SHOULD NOT ORDINARILY EXERCISE THEIR SUPERVISORY POWERS IN THIS AREA

Many of the considerations mentioned above with respect to the Sixth Amendment militate as well against formulating a general rule for preindictment

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[12] See, *e.g.*, *Second Circuit Rules Regarding Prompt Disposition of Criminal Cases* (Jan. 5, 1971), requiring the government to be ready for trial within six months of arrest or indictment, whichever is earlier.

[13] ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Speedy Trial* 23 (Approved Draft 1968).

delay on the basis of the Due Process Clause of the Fifth Amendment. Of course the Due Process Clause is not limited to the rights of an "accused" in a "criminal prosecution" as is the speedy trial guarantee. Nevertheless, a standard regarding prosecution delay before arrest or indictment would still entail all the adverse consequences mentioned above. Lengthy hearings with respect to when the government could have proceeded would be unavoidable since mere passage of time could not be deemed "delay" unless it involved the government's postponing action that could have been taken. And as we have pointed out, the fact that the government could, in retrospect, have acted cannot reasonably be transformed into an absolute requirement that the prosecution should be aborted because the government did not act at the first possible moment.

These difficulties obviously could be avoided by relying on a general standard based simply on the lapse of time between commission of the offense and the filing of charges, without reference to the ability of the prosecution to move earlier. This of course essentially describes the function of a statute of limitations. It is our position that, with narrow exceptions, any prosecution brought within the general time limits reasonably set by Congress is not subject to challenge for delay under the Due Process Clause.[14]

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[14] The courts of appeals have taken varying positions on this question. Some have held that the statute of limitations exclusively controls, see *United States* v. *Grayson*, 416 F. 2d 1073, 1076–1077 (C.A. 5); *Lothridge* v. *United States*, No. 20647, C.A. 6, decided April 29, 1971; *United States* v. *Reed*, 413 F. 2d 338, 340 (C.A. 10). Others have held that due process might

We start with the proposition that "the applicable statute of limitations * * * is usually considered the primary guarantee against bringing overly stale criminal charges," *United States* v. *Ewell,* 383 U.S. 116, 122. Unlike England, where there are relatively few statutes of limitations on criminal prosecutions,[15] in this country there is a "long-standing congressional 'policy of repose.'" *Bridges* v. *United States,* 346 U.S. 209, 215–216. In 1790, Congress enacted a general statute of limitations barring criminal prosecutions of non-capital offenses unless brought within two years of commission of the offense. 1 Stat. 112, 119. The period of limitation was extended to three years in 1876, 19 Stat. 32, and five years in 1954, 68 Stat. 1145, 18 U.S.C. 3282. The latter statute is applicable to this case and does not bar this prosecution since the indictment was returned within less than five years. There is no reason to believe that the general five-year limitations period is inherently unreasonable, and there are no special circumstances suggesting that due process required a shorter period in this case.

Foremost among the policies underlying the federal statutes of limitations is Congress' desire to protect

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be denied in extraordinary circumstances, see, *e.g.*, *Schlinsky* v. *United States*, 379 F. 2d 735, 737 (C.A. 1) (relief might be available if there is a showing of "actual prejudice" and "improper motivation" for delaying); *Terlikowski* v. *United States*, 379 F. 2d 501, 505 (C.A. 8) (due process denied if the government "deliberately utilized delay to strengthen its position by weakening that of the defense"); *Benson* v. *United States*, 402 F. 2d 576, 580 (C.A. 9) (requiring "special circumstances"); compare *United States* v. *Napue*, 401 F. 2d 107, 114 (C.A. 7).

[15] Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. Pa. L. Rev. 630 (1954).

persons from having to defend charges of long-past misconduct. The statute also exerts time-pressure on law enforcement officials to discover law-violators and bring them to justice.[16] As against these policies, there is the danger that a period of limitations, particularly a relatively short one, may lessen the deterrent force of the criminal law by allowing the guilty to escape prosecution and may also prevent confinement of dangerous offenders.

The limitations period chosen reflects a congressional balancing of these considerations. Judicial scrutiny of pre-indictment or pre-arrest delay under the Due Process Clause, as this Court has interpreted that constitutional provision, see *In re Winship,* 397 U.S. 358; but see *id.* at 377 (Black, J. dissenting), would involve the courts in the same process. Whether the delay before indictment or arrest were judged in light of "fundamental fairness," *Duncan* v. *Louisiana,* 391 U.S. 145, 171, 186–187 (Harlan, J., dissenting), or the "community's sense of fair play and decency," *Rochin* v. *California,* 342 U.S. 165, 173, the courts would have to weigh the same factors that underlay Congress' decision in 18 U.S.C. 3282 to allow prosecutions to be brought within five years after the offense. "Such legislative judgments are clearly entitled to great weight in determining what constitutes unreasonable delay." *Dickey* v. *Florida,* 398 U.S. 30, 47 (Brennan, J., concurring). And with respect to pros-

[16] In addition, the statute may provide an opportunity for self-rehabilitation by offering security from prosecution when the limitation period has run; if the offender has not reformed, he can be indicted for his more recent offenses.

ecutions governed by 18 U.S.C. 3282, we submit that due process of law is not denied when the time limits prescribed by Congress are observed.

We recognize of course that a statute of limitations is a general standard and that, in contrast, the Due Process Clause could serve as a basis for rendering judgments about the particular circumstances in each individual case. There are, to be sure, particular instances where the passage of time between commission of the offense and indictment may have exceptionally lessened the defendant's ability to defend. But even if due process of law meant, which it surely does not, that an indictment must be dismissed for any delay whatsoever, the possibility that memories dimmed or records disappeared would still remain in cases where the government acted with utmost dispatch. The risk is inherent in any system of criminal justice and while it might be reduced by a case-by-case approach under the Due Process Clause, the possibility of accomplishing some good is clearly outweighed by the other factors we have mentioned above, *supra* pp. 20–23, not the least of which are the overriding substantive difficulties and procedural delays involved in determining when the government should have moved against each potential defendant.

In arguing that due process is not denied when a prosecution is begun within the applicable period of limitations, we do not ignore the problem that would be presented if a prosecutor intentionally delayed the start of criminal proceedings for the purpose of impairing the potential defendant's ability to defend. We are aware of no such cases, but whether a court acted

on the basis of the Due Process Clause or its supervisory power, that kind of tactic surely would not and should not be tolerated.[17] The focus in such a situation should not be on the delay as such, but on the prosecutorial overreaching it reflects. We also do not deal here with cases where there is no applicable statute limiting the time for prosecutions since [18] that is not the situation in this case.

Moreover there are no circumstances presented here that would justify promulgating a special rule on the basis of this Court's supervisory power, as the United States Court of Appeals for the District of Columbia did with respect to a particular type of narcotics investigation routinely conducted by the Metropolitan Police. *Ross* v. *United States*, 349 F. 2d 210 (C.A. D.C.). In *Ross*, the court held that even though the defendant had been charged well within the statute of limitations, the delay of seven months between the alleged commission of the offense and the swearing out of the complaint required reversal of his subsequent conviction. The court based its decision on a number of special factors: (1) the defendant was charged with a narcotics violation arising from a single transaction with an undercover agent of the Metropolitan Police; (2) his conviction was based solely on the agent's

[17] Compare *Acree* v. *United States*, 418 F. 2d 427, 430 (C.A. 10) (relief might be granted if the facts "demonstrate a delay with a sinister purpose"); *Terlikowski* v. *United States*, 379 F. 2d 501, 505 (C.A. 8) (due process would be denied if the government "deliberately utilized delay to strengthen its position by weakening that of the defense").

[18] For capital offenses Congress has set no time limit for when an indictment may be found. 18 U.S.C. 3281.

testimony; (3) the agent had been involved in numerous narcotics transactions and needed the aid of his notebook to testify about his short encounter with the defendant; (4) the only reason for the delay of seven months before charging the defendant was a desire not to disclose the agent's identity until his undercover work had ceased; and (5) the defendant had only a limited education and experienced difficulty in remembering events even in the recent past, as did one of his witnesses. Thus, the court held that "in this very narrow and specialized class of narcotics cases" a "due regard for [the court's] supervisory responsibility" called for relief. 349 F. 2d at 215–216. Subsequent cases have confirmed that *Ross* is limited to the particular circumstances there presented,[19] which are in no way analogous to those here and indeed could be assessed only after a trial.

[19] See *e.g.*, *Bey* v. *United States*, 350 F. 2d 467 (C.A. D.C.), also a narcotics case, distinguishing *Ross* on the ground that there was more than one transaction and each involved a lengthy confrontation with a trained undercover agent of the Federal Bureau of Narcotics; *Daniels* v. *United States*, 357 F. 2d 587 (C.A. D.C.), another narcotics case, where both the majority and dissent distinguished *Ross* on the ground that there was corroboration for the agent's testimony and because the "risk of conviction of an innocent person—the basic concern of the Narcotics Delay cases—was no greater here than in the ordinary criminal cases," *id.* at 590 (Bazelon, C.J., concurring on this point, but dissenting on other grounds).

IV

EVEN IF JUDICIAL EXAMINATION OF PRE-INDICTMENT DELAY WERE APPROPRIATE, RELIEF SHOULD NOT BE GIVEN WITHOUT A SHOWING OF ACTUAL PREJUDICE, WHICH HAS NOT BEEN MADE IN THIS CASE

A

For the reasons given, we think it clear that the Sixth Amendment does not apply to the period before charges are brought, and that it is inappropriate to apply constitutional due process principles to delay as such (absent clear prosecutorial abuse). Nor should the courts substitute their supervisory powers for the judgment Congress has made unless an unusual situation is presented. But even if there were to be judicial consideration of the time lapse before charges were brought in a particular case, we urge that the only sound basis for granting relief from a delayed indictment should be a particularized showing of exceptional prejudice to the defense.

The drastic step of dismissing a criminal prosecution that has been instituted within the statute of limitations can, in our view, only be justified if the court has determined that the injury to the defendant outweighs the public interest in trying him for the offenses charged. In the absence of a showing of actual harm to the defendant from the delay, the balance is quite clearly in favor of allowing the prosecution to proceed. In cases involving delay between indictment and trial, the Court has required the defendant to show that he has thereby been prejudiced. See *United States* v. *Ewell,* 383 U.S. 116, 120, 122;

Dickey v. *Florida*, 398 U.S. 30, 36–38; see also *United States ex rel. Solomon* v. *Mancusi*, 412 F. 2d 88 (C.A. 2), certiorari denied, 396 U.S. 936. Particularly since potential defendants are not imprisoned and are not under the shadow of public accusation, the Court should require at least as much when the claim for relief is based on pre-indictment delay.

In addition, the accused should have the burden of showing prejudice. He will know whether potential witnesses have disappeared or whether records have been lost, and he will also know how these would have been material to his defense. These are matters not necessarily known to the government. Moreover, to require the government to show lack of prejudice would impose upon it the unrealistic task of predicting possible defenses and the variety of ways these could be presented and of then showing that no significant evidence that might have been available to support these defenses was lost. In seeking the extraordinary remedy of having the indictment dismissed, the accused therefore should carry the burden of proving specific prejudice.

Factors other than prejudice might, of course, become relevant if there were to be such judicial examination of pre-indictment delay. If the delay in bringing charges is not in fact attributable to the government (but rather, for example, to identifiable defense efforts to impede the investigation), the issue of prejudice would not be reached. And when the delay is chargeable to the government, the government should be allowed to show countervailing reasons why an indictment should not be dismissed even when there is

a certain amount of prejudice to the defendant; that is, there should be a balancing of the justification for a delay against the resulting prejudice. For example, if the government shows that it needed the time for the investigation of an unusually complex case, or to verify the appropriateness of proceeding, or to identify other persons directly involved in an illegal scheme, we would urge that a higher standard of prejudice should be required than in a case of unexplained delay. And obviously the length of the delay would be an element in any such assessment of reasonableness as well as in the assessment of prejudice.

B

It is evident that the indictment in this case was improperly dismissed if, as we have contended, the courts should not examine preindictment delay not exceeding the limitations period. There is no suggestion here of deliberate or oppressive conduct on the part of the government. See *Pollard* v. *United States*, 352 U.S. 354, 361. The most that can be said is that an inadequate work force and the need to use available manpower to move forward with cases commanding a higher priority prevented more expeditious handling of the matter. Thus, this must be treated as a case of delay which—though perhaps chargeable to the government—has none of the elements that might give rise to a due process claim. Nor are there special circumstances here appealing to the exercise of supervisory power.

Even if this kind of pre-indictment delay is appropriate for judicial examination, there has been no

showing that this is a case where relief was warranted.

In the first place, it is not clear in this case how much of the time should be regarded as unjustified delay. The particular offenses charged in the indictment allegedly occurred between September 1965 and January 1966; the indictment was filed on April 21, 1970, a little more than four years after the last act charged. Exactly how much earlier than April 1970 the prosecution against appellees could have been initiated has never been determined. Newspaper articles appearing in the Washington Post in September and October 1967 disclosed the fraudulent practices of certain home improvement companies, including appellees', and reported that a two-man task force in the United States Attorney's office had been assigned to investigate (App. 27). The district judge's conclusion that the government had sufficient information to commence prosecution in late 1967 is based solely upon the newspaper stories. But newspaper reporters do not necessarily follow probable cause standards.[20] Appellees' files, which had to be examined thoroughly before any action could be taken, were not obtained by government investigators until early 1969 (App. 31–32,

[20] At the hearing before Judge Hart, government counsel did not agree that the substantive allegations of the newspaper articles were true. The United States Attorney at the time of the disclosures by the Washington Post, who was quoted as indicating that a grand jury sworn on October 9, 1967, would investigate, was no longer in office at the time appellees were actually indicted.

34)[21] and there is no indication that they could have been secured earlier.

In any event, even assuming that the government is chargeable with an unjustified delay after 1967, there is no showing of real prejudice here. As in *United States* v. *Ewell, supra*, 383 U.S. at 122, "the appellees' claim of possible prejudice in defending themselves is insubstantial, speculative, and premature. They mention no specific evidence which has actually disappeared or has been lost, no witnesses who are known to have disappeared."

Appellees undoubtedly knew or should have known that they were under criminal investigation long before they were summoned for a grand jury appearance, since their files had been transmitted to the United States Attorney's Office sometime between the summer of 1968 and January 1969. Moreover, the government disclosed that its case was based essentially on documentary evidence. In *Tynan* v. *United States*, 376 F. 2d 761 (C.A. D.C.), certiorari denied, 389 U.S. 845, a speedy trial claim was rejected in a case involving multiple counts of mail fraud; the Court found clear distinctions between the problems of proof in the defense of a narcotics prosecution (*Ross, supra* p. 27) and a mail fraud trial. In the latter the "nature of the Government's proof in support of the several counts of the indictment is not of the nature that is blurred, obscured, dissipated, or destroyed by the passage of the period of time involved in this case. The transactions involving individual witnesses are generally

[21] Or, according to appellee Marion, the summer of 1968 (App. 31–32, 34).

unique in their experience, and where documentary evidence is accepted, it, by its very nature, retains its reliability." 376 F. 2d at 763.

The loss of relevant proof in the present case is especially unlikely in view of the fact that during the pre-indictment period the appellees were continuously engaged in the defense of a number of civil actions involving the same subject matter as the criminal charges (see p. 7 *supra*). At least two of these civil actions involve appellees' dealings with victims named in the indictment (note 2 *supra*).

This case is an apt illustration of the dangers that lie in an expansive interpretation of claims of denial of a speedy trial with respect to the period between offense and the beginning of criminal proceedings. Within the period of limitations appellees have been charged with gross fraud upon unsuspecting and unprotected members of the public. Under the district court's order they are allowed to go free without trial because—at most—some prosecutor or investigator might have been more diligent. This result is reached in a case where documentary evidence, unaffected by the passage of time, will be a major part of the proof and where the appellees have made no showing of any loss of witnesses or actual harm. Dismissal in this case would in no way aid the interests of justice.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be reversed and the indictment ordered reinstated.

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